Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

(2)

No. 95-642

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRED A. FRIEND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

10 pp

QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury regarding vicarious liability for offenses committed by a co-conspirator.

2. Whether petitioner's conviction violated due process because there was insufficient evidence to support application of the vicarious liability doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), with regard to violation of 18 U.S.C. 924(c).

3. Whether the court of appeals correctly determined that the use of a firearm by petitioner's co-conspirator was reasonably foreseeable to petitioner.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Discussion	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, Nos. 94-7448 & 94-7492 (Dec. 6, 1995)	6, 7
Pinkerton v. *United States*, 328 U.S. 640 (1946)	3

Statutes:

18 U.S.C. 924(c)	2, 4, 5, 6
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-642

FRED A. FRIEND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A4-A17) is reported at 50 F.3d 548.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1995. A petition for rehearing was denied on April 25, 1995. The petition for a writ of certiorari was filed on July 25, 1995, and is therefore out of time under this Court's Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on three counts of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1); four counts of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of conspiring to commit those offenses, in violation of 21 U.S.C. 846; and one count of using a firearm equipped with a silencer during or in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). The court sentenced petitioner to 151 months' imprisonment on the drug trafficking counts, and to 360 months' imprisonment on the firearm-with-a-silencer count. Section 924(c) mandated that the 30-year sentence be imposed for using the firearm equipped with the silencer and that the sentence run consecutively to the other sentences imposed. The court of appeals affirmed petitioner's drug trafficking and conspiracy convictions. 50 F.3d 548, 554.[1] The court reversed petitioner's conviction for using a silencer-equipped firearm, however, and affirmed, instead, a conviction for the lesser included offense of using a firearm during or in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). 50 F.3d at 552-554.

1. Petitioner was a member of the Hell's Angels Motorcycle Club in Omaha, Nebraska, and he and other members of the club manufactured and distributed methamphetamine in the Omaha area. On October

---

[1] We cite to the published report of the court of appeals' opinion because the opinion as reproduced in the petition appendix contains numerous typographical errors.

17, 1990, the police, armed with a search warrant, searched the Hell's Angels clubhouse. 50 F.3d at 550. Petitioner was in the clubhouse when the search warrant was executed and the police recovered 3.5 grams of methamphetamine on his person. *Ibid.* A police officer also had his drug detection dog sniff several cars parked in the alley next to the clubhouse. The dog alerted to petitioner's car. The police impounded the car, obtained a warrant to search it, and recovered in the trunk approximately a pound of methamphetamine that was packaged in the same manner as drugs later found in the home of Gary Apker, the ringleader of the enterprise. *Ibid.*

That same day, the police searched Apker's home and recovered ten pounds of methamphetamine, $225,000 in cash, and a firearm equipped with a silencer. 50 F.3d at 552. The police found the firearm inside a cloth bag, in a large compartment beneath the cement floor under a bathroom vanity in the basement level garage. *Ibid.* Most of the money and drugs were found in the same compartment. *Ibid.*

At trial, the jury convicted petitioner on eight counts of drug trafficking and conspiracy, as well as one count of using the firearm recovered from Apker's home during or in relation to the methamphetamine distribution conspiracy. The silencer conviction increased petitioner's sentence by 30 years. 50 F.3d at 552.

2. The court of appeals affirmed the district court judgment except with regard to the conviction for the silencer. The court of appeals acknowledged that under *Pinkerton* v. *United States*, 328 U.S. 640, 647-648 (1946), "[a] conspirator is criminally liable for a substantive offense committed by another conspirator within the scope and in furtherance of the conspiracy

unless that offense 'was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.'" 50 F.3d at 552-553. Thus, conspirators like petitioner who did not actually use or carry a firearm can be convicted under Section 924(c) when firearms are used by co-conspirators. 50 F.3d at 552-553.

The court of appeals found that in order to sustain such a conviction in petitioner's case, the government had to establish that (1) another co-conspirator (here, presumably Apker, according to the court of appeals) violated Section 924(c) by using or carrying a firearm equipped with a silencer during or in relation to a drug trafficking conspiracy, and (2) the co-conspirator's possession of a silencer-equipped firearm could have been reasonably foreseen by petitioner as a natural or necessary consequence of their conspiracy. 50 F.3d at 553-554. The court found that the first requirement was met because the jury could have found that "Apker used a silencer-equipped firearm to further the conspiracy when he secreted that weapon in the midst of his stash of methamphetamine and cash." *Id.* at 553. The court found that the second requirement was not met because there was no proof that Apker's use of a silencer could have been foreseen by petitioner. *Id.* at 554. The court also found, however, that use of a firearm alone, *i.e.* without a silencer, was a reasonably foreseeable consequence of the conspiracy.[2] The court concluded that the evi-

---

[2] The court of appeals rejected petitioner's claim that the trial court should not have instructed the jury regarding whether Apker's possession of the silencer-equipped weapon "could have been reasonably foreseen" but rather should have

dence "clearly put [petitioner] well inside the periphery of the conspiracy, in a position to know the violent nature of the business and therefore the likelihood that a major supplier like Apker would have a stash of drugs and proceeds protected by a firearm." *Ibid.* The court believed that the evidence therefore "justifies convicting conspirator [petitioner] for Apker's use of a firearm," and found that the jury, in convicting petitioner of the use of the firearm-with-a-silencer in violation of Section 924(c), necessarily had found that he committed the lesser offense of use of a firearm in violation of Section 924(c). Accordingly, the court reversed petitioner's conviction on the silencer and the related mandatory, consecutive 30-year sentence. The court affirmed the conviction for the lesser included offense of use of a firearm and remanded for modification of the sentence to reflect the mandatory, consecutive five-year sentence for that offense. 50 F.3d at 554.[3]

DISCUSSION

Petitioner challenges his conviction under 18 U.S.C. 924(c) for use of a firearm during or in relation to a drug trafficking offense. Petitioner contends that the jury instructions regarding foreseeability and the Section 924(c) charge permitted the jury to apply a standard less than "beyond a reasonable doubt" (Pet. 8-10); that his conviction violates due process because he was held vicariously liable for the

---

instructed the jury to determine whether the possession "was reasonably foreseen." The court noted that it had previously approved the challenged instruction. 50 F.3d at 553 n.3.

[3] The court of appeals also affirmed the denial of petitioner's motion to suppress evidence. 50 F.3d at 550-552. Petitioner does not urge further review of that issue.

firearm violation under *Pinkerton* even though the firearm possession was not reasonably foreseeable by him (Pet. 11-14); and that the government was not required to introduce evidence to prove that the firearm use was foreseeable but, instead, was erroneously permitted to rely on an assumption that use of weapons is foreseeable in large drug trafficking enterprises (Pet. 15-28).

The firearm at issue was recovered by the police during the search of the home of petitioner's co-conspirator. The court of appeals stated that the firearm was "found in a large compartment beneath the cement floor under a bathroom vanity in the basement level garage, wrapped in a cloth bag and surrounded by most of the money and drugs." 50 F.3d at 552. The court also stated that "[v]iewing the trial evidence in the light most favorable to the government," the government proved that Apker violated Section 924(c) by using or carrying that firearm equipped with a silencer during and in relation to the drug trafficking conspiracy because the jury could find that he used it when he "secreted the weapon in the midst of his stash of methamphetamine and cash." 50 F.3d at 553.

In *Bailey* v. *United States*, Nos. 94-7448 & 94-7492 (Dec. 6, 1995), the Court held that in order to sustain a conviction for use of a firearm in violation of Section 924(c), the government "must show that the defendant actively employed the firearm during and in relation to the predicate crime." Slip op. 14. The Court indicated that active employment must be supported by evidence of more than mere possession, and could be based on a defendant's brandishing, displaying, bartering, striking with, firing, or attempting to fire

the firearm, as well as referring to a firearm in his possession. *Id.* at 6, 12.

In light of the circumstances of this case, we believe it would be appropriate for the Court to grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further consideration in light of *Bailey* so that the court of appeals can assess petitioner's claims under the *Bailey* standard in light of all the trial evidence.

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' judgment vacated, and the case remanded for further consideration in light of *Bailey* v. *United States*, Nos. 94-7448 & 94-7492.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

DECEMBER 1995